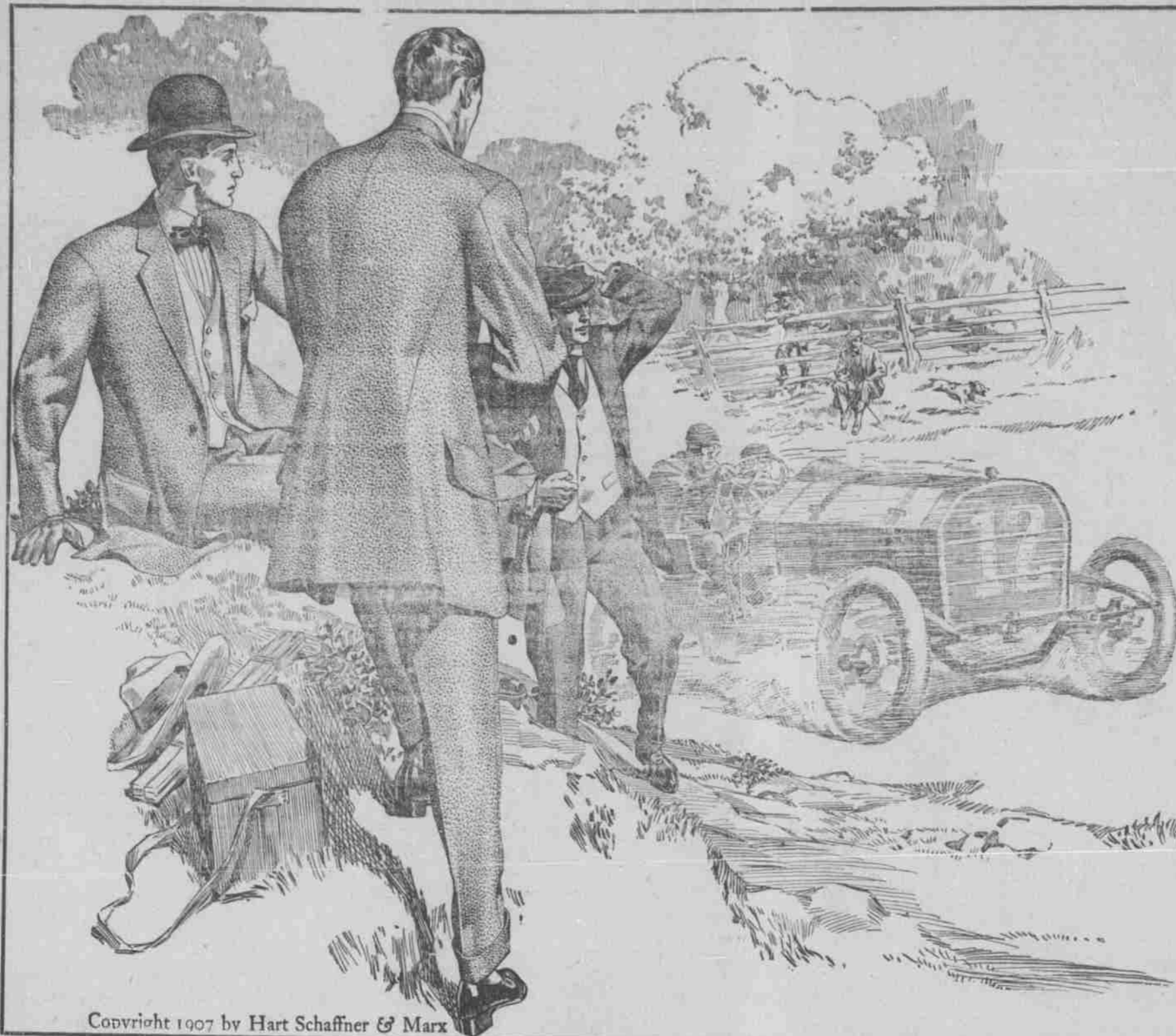


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### DECISION IN THE BRANCH WILL CASE.

No. 7603.

In the Kansas City Court of Appeals.

OCTOBER TERM, 1906.

In the matter of the Final Settlement of the Estate of Henry C. Branch, deceased.

Emily W. Branch, Executrix and Respondent.

Susan M. Howe and Aquilina P. Tucker, Objectors and Appellants. APPEAL FROM LAFAYETTE CIRCUIT COURT.

This proceeding originated in the Probate Court of Lafayette County on objections filed by two of the heirs of Henry C. Branch, deceased, to the final settlement made by the executrix of the estate. The three objections with which we now are concerned were found against objectors in the probate court and a similar conclusion was reached in the circuit court, to which the objectors appealed. Judgment was entered approving the settlement and taxing the costs of the proceeding in the circuit court against the objectors. From this judgment the present appeal is prosecuted.

Henry C. Branch died testate at his home in Lafayette County on March 14th, 1903, leaving a widow and ten children, all of whom were of legal age at the time of his death. Some of the children, including the two objectors, were the fruit of a former marriage of the decedent, the others were offspring of his union with the wife who survived him, the present executrix.

In his last will, which was duly probated, the testator bequeathed all his personal property after the payment of his debts therefrom to his wife and directed the executrix "to sell all of my real estate as soon as the same can be done without sacrifice and after paying to my said wife the sum of twenty-five hundred dollars to divide the residue of the proceeds of such sale between my children." Shortly after his death, his widow, who was nominated executrix in the will, was granted letters testamentary and proceeded with the administration of the estate. The personal estate proved to be more than sufficient to pay the debts of the estate and the contests before us relate to the manner in which the executrix handled and disposed of the real property under the provision of

the will above quoted. This property consisted of a farm of 173.62 acres situated in Lafayette County. It had been the home of the testator and his wife for a number of years preceding his death and for about two years before that event their son, Glover, had lived on the place and assisted his father who was in poor health in farming it. Soon after her appointment the executrix rented the farm to Glover for one year at a rental of \$520.80, which was at the rate of \$3.00 per acre. It is claimed by the objectors that \$3.50 per acre was the fair rental value of the place and their first ground of objection relates to this item.

On November 18th, 1903, the executrix sold and conveyed the farm to Glover for \$50.00 per acre, amounting to \$8,681.00 for the whole farm. Objectors contend that \$60.00 per acre was the reasonable market value of the farm at that time and their second objection has for its object the holding of the executrix to account for the land at that value.

Shortly before his death, decedent, realizing that he was justly indebted to his son, Glover, for services on the farm, delivered to him, duly signed, the following written promise:

"Lafayette Co., Mo., January 12, 1903.

I promise to pay my son, C. G. Branch (Glover), a fair compensation for services rendered me upon the farm time commencing June 17th, 1901."

It appears that Glover presented a demand against the estate for \$500.00 for these services and that all of the heirs, including the objectors, consented to the allowance of that sum, but the objectors say their consent was obtained by the promise of the executrix to charge nothing for her services and, as she charged and was allowed the compensation provided by law, they are justified in objecting to the amount of Glover's demand. They assert that the reasonable value of his services, which covered a period of about a year and three-quarters, was \$250.00 per year, and therefore that the allowance overpays him to the extent of \$62.50, with which amount they ask that the executrix be charged.

First, we will consider the second objection. On the issues involved therein, the court at the instance of the objectors gave the following declaration of law:

"The court declares that under the evidence the exceptors are entitled

to have the executrix charged with the difference between the price for which she sold the lands of the deceased and whatever greater value the court may believe from the evidence the land would have sold for or was reasonably worth at the time of the sale."

In view of this declaration, the finding of the court in favor of the executrix on this objection was a finding of the fact, that under the evidence the land had been sold at its reasonable value and at the highest price obtainable. This is conceded by the objectors, but the rule is invoked "that the trial of objections to items of final settlement of administrators must be had without the intervention of a jury and that in reviewing such causes, the rules applicable to appeals in equitable actions will govern." Finley vs. Schlueter, 54 Mo. App. 456; In re Meeker's Estate, 45 Mo. App. 186; In re Tucker's Estate, 74 Mo. App. 331; In re Schooler's Estate, 73 Mo. App. 301; Clark vs. Bettelheim, 144 Mo., 238.

And we are besought to make our own finding of fact from the evidence in the record before us as should be done in an equitable action. Counsel for respondent in his presentation of the issue takes appellants' on their own ground and, as our conclusion coincides with that of the learned trial judge, we will consider the facts in evidence from the chosen standpoint of the parties themselves.

Thus approaching them, we are impressed that the great weight of the evidence tends to show that the executrix sold the land at its reasonable market value. Witnesses for the objectors estimated the value of the farm at from \$50.00 to \$70.00 per acre at that time, but it was shown that the farm was cut up somewhat by ravines and contained from fifteen to twenty waste acres, also that the improvements were of a quite inferior character. It is fair to say that the witnesses for the objectors as a rule disclosed on cross-examination that they had not made a sufficient allowance for these deficiencies, nor did they appear to be so familiar with the physical characteristics of the place or with land values in that immediate vicinity as were the witnesses for the executrix. We do not deem it important to detail the evidence and will content ourselves with the foregoing statement of the result reached

from its analysis.

But counsel for the objectors argue the executrix did not obtain the highest price for which the land could have been sold; that she not only made no effort to find purchasers, but discouraged those who approached her on the subject of purchasing the land by telling them that it was not for sale, all with the end in view of making a sale to her son, Glover, at the lowest market price.

We agree with counsel that the direction in the will to the executrix to sell the land "as soon as the same can be done without sacrifice" obviously refers to the time when the land could be sold and in no wise lessened the measure of her duty when she decided to offer it for sale to employ the degree of diligence that would have characterized the conduct of a reasonably prudent person in the management of his own affairs. Hill vs. Evan, 114 Mo., App., 715; Merritt vs. Merritt, 62 Mo., 150; Booker vs. Armstrong, 93 Mo., 49; Powell vs. Hurt, 108 Mo., 1, c. 513; Hayes vs. Fry, 110 Mo. App. 1, c. 25.

The absolute direction to sell is to be regarded as converting the devise of land into one of money. "Nothing is better established than this principle that money directed to be employed in the purchase of land and land directed to be sold and turned into money are to be considered as that species of property into which they are directed to be converted." And it may be stated as a fixed rule that under a direction of this character the executor does not become a mere trustee of the moneys received by him from the sale of the lands, but takes them in his capacity of executor. Johnson vs. Johnson, 72 Mo. App., 336; Francisco vs. Wingfield, 161 Mo., 542; Baldwin vs. Dalton, 108 Mo., 20; In re Corrington, 124 Ill., 363.

Conceding that these strict rules should be used in measuring the conduct of the executrix, we do not find that she has fallen short in the performance of duty. It was quite natural and not at all censurable that she should desire her son, who had been his father's mainstay during his last days, to have the home place instead of a stranger. Such preference, if she did not permit it to work an injury to the other heirs, could not be regarded rightly in any other light than praiseworthy and, if she determined on letting her son have the farm at the highest price she had

reason to think could be obtained for it, she should not be pronounced derelict for not seeking other buyers. Many reasonably prudent persons sell lands without trying to obtain other bids when satisfied that the offer made represents full value. Some think that to place land on the market conveys the impression that it must be sold and thereby tends to depreciate its selling value. So that advantages and disadvantages of one method over another is largely a matter of individual judgment in the exercise of which reasonably prudent persons differ. We do not feel justified in saying that the executrix was negligent because she did not pursue the method the objectors think might have produced better results. Nor do we attach any weight to the evidence which they claim tends to show that a better price could have been obtained.

A real estate agent had a customer for another farm and approached the owner with an offer. The owner asked, "Where would I go?" to which the agent replied, "You buy the Branch place for \$60.00." That was all of the conversation and the negotiations terminated with it. After this the agent of his own motion took another person, to whom he was trying to make a sale, to the Branch farm and asked him, "What do you think about this place?" To the best of the agent's recollection, the man said he would give \$55.00 for it. When they returned to town, they chanced to encounter Mrs. Branch. The agent accosted her with the inquiry, "Mrs. Branch, what is the least money that will buy that farm?" and she answered, "It is not for sale." The agent admitted on cross-examination he had heard that the farm had been sold to Glover at the time in question, and from his other testimony it is evident that the sale had been consummated.

After the sale, one of the objectors, accompanied by her husband, went to see the executrix and in the conversation that ensued the husband said, "I am like my wife, I think you are selling it too cheap if you sell it for \$50.00. I will give you \$52.50 and I know of another man that will give you more." The reply was to the effect that the farm had been sold and the executrix "did not want to sell it twice."

It will be noticed that neither of these offers was made at a time when Mrs. Branch felt that she was

in a position to consider them and, being made with knowledge of the situation on the part of the offerors, their good faith well may be doubted. That the real estate agent should go to the trouble and expense of driving out on what he describes to be a very cold day to show a prospective customer a farm he had reason to believe had just been sold and which he had not been employed to sell smacks strongly of an act inspired by those who thought they had an interest to serve in embarrassing the executrix and, when this was followed by the visit of one of the objectors above noted the assertion made by her husband that he would give \$52.50 for the place "and I know of another man that will give you more" plainly enough indicates the character of the fabric that was woven to ensnare the executrix. We are satisfied that the executrix, who acted always on the advice her counsel, whose ability and integrity cannot be and are not questioned, acquitted herself in a manner befitting her duty and that she sold the land for the best price obtainable.

Equally as untenable is the first objection. The great weight of the evidence shows that \$3.00 per acre was the full rental value of the land for one year. The offer of a larger rental made a month or more after the land had been rented by the same objector who offered to buy the land at \$52.50 after it had been sold, carries no other weight than to deepen our conviction that the objectors from the first were actuated by a purpose to harass the executrix in the discharge of her duty.

The third objection has even less to commend it than the others. Not only does the evidence fully sustain the reasonableness of the charge made by Glover for his services, but the objectors themselves stood by acquiesced in the allowance of demand as a judgment against estate. Even should we think, as we do not, that the judgment is excessive, in the small amount claimed, permit the objectors, on the right assigned, to have the excess charged against the executrix would be well indefensible under the evidence before us. We find as a fact that the executrix did not agree to waive her compensation and this is all that be said on the subject.

The judgment is affirmed.

All concur.

J. M. JOHNSON.

STATE OF MISSOURI--SCT. I, L. F. McCoy, clerk of the Kansas City Court of Appeals, do hereby certify that the foregoing is a true copy of the opinion of said court, delivered in the foregoing entitled cause on March 4, 1907, as fully as the same appears on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Kansas City Court of Appeals. Done at office in Kansas City, State of Missouri, March 4, 1907.

L. F. McCoy, Clerk.

Adv. 11